No 321

SEP 4 1943

CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1943.

THE NORSTRAND CORPORATION and
LEIF NORSTRAND,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

RING & MURRAY,
Attorneys for Petitioners-Appellants.

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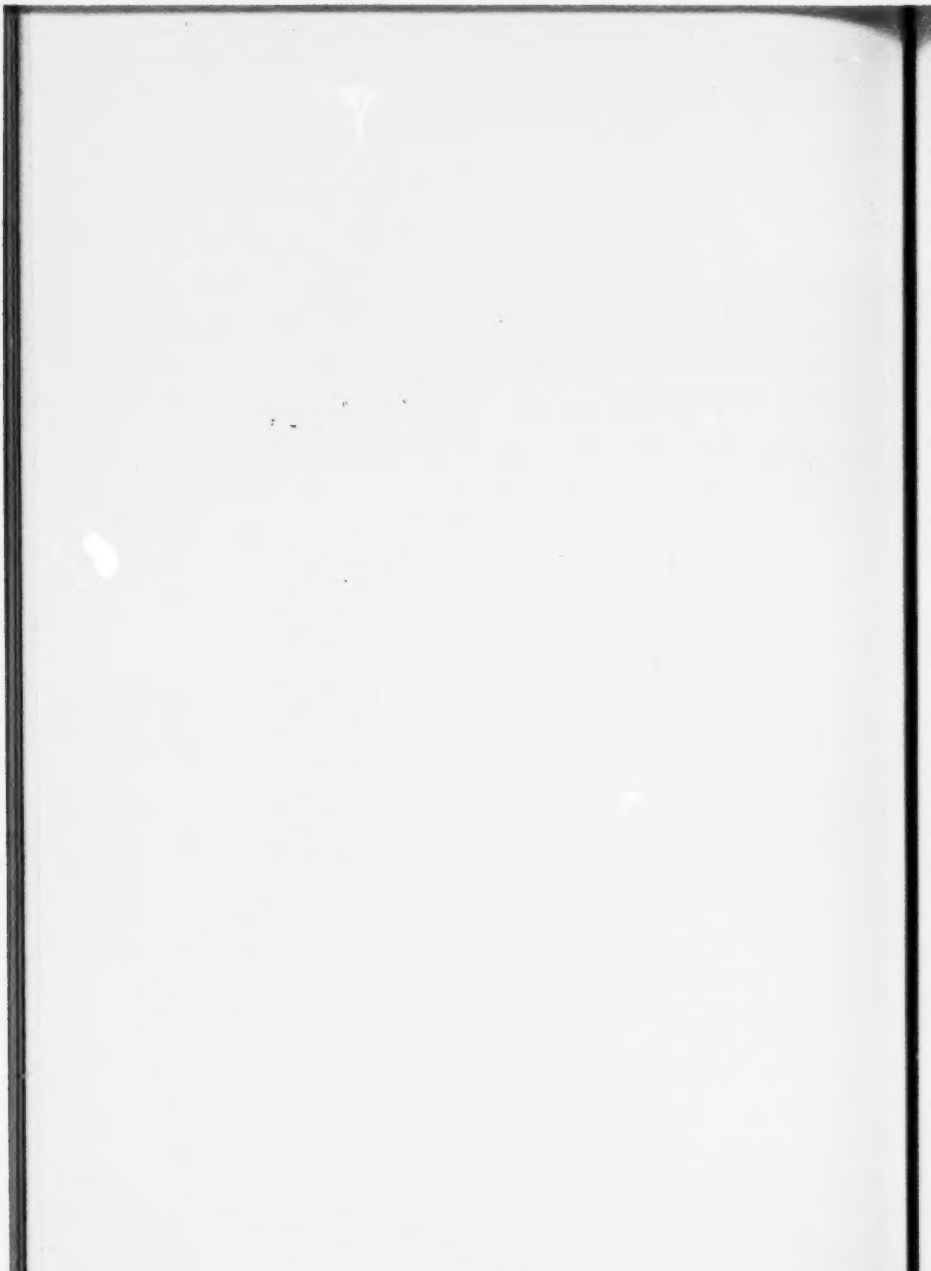

Supreme Court of the United States

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THE NORSTRAND CORPORATION and LEIF NORSTRAND,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To The Honorable, The Chief Justice And Associate Justices Of The Supreme Court Of The United States:

Your petitioners, The Norstrand Corporation and Leif Norstrand, pray for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit to review an order of that Court in this cause filed August 4th, 1943, dismissing an appeal herein.

Summary Statement Of The Matter Involved.

On December 4th, 1942, the petitioners pleaded guilty to an information concerning violation of the Emergency Price Control Act. On December 8th, 1942 they were sentenced by the Hon. Alfred C. Coxe, United States District Judge, to pay fines "jointly and severally" of Five Thousand ($5,000) Dollars, Sixteen Hundred ($1600) Dollars,

and Five Hundred ($500) Dollars, totaling Seventy-one Hundred ($7100) Dollars; on March 8th, 1943, within the time permitted by the rules of the Southern District of New York, petitioners filed a petition for a reconsideration or rehearing of the aforesaid judgment chiefly on the ground that false statements had knowingly been made by the Assistant District Attorney to induce the Court to fine the petitioners the additional Sixy-six Hundred ($6600) Dollars. The petition, after some consideration, was denied April 19, 1943 by Hon. Alfred C. Coxe. On April 24th, 1943 the petitioners filed a Notice of Appeal from the sentence which had been imposed on December 8th, 1942 and from the denial of the petition for reconsideration of the judgment. On May 4th, 1943, the petitioners filed in the District Court an Assignment of Errors in connection with their Notice of Appeal.

Thereafter, the respondent moved to dismiss the appeal

(1) ". . . because in so far as the appeal is taken from the sentence, more than five days elapsed from the date of sentence to the filing of a notice of appeal, . . ."

and

(2) ". . . in any event the sentence was upon a plea of guilty, . . ."

and

(3) ". . . in so far as the appeal is from the denial of a motion to reduce the amount of the fine, the determination of the lower Court was within its discretion and is not appealable."

In view of the motion, the time to file the record on appeal was extended pending the outcome of the motion.

There was no record before the Circuit Court of Appeals other than the Notice of Motion and a statement of the Clerk, a copy each of which is printed in the appendix herein and which sets forth the foregoing dates.

On July 19, 1943 on oral argument, the judges of the Circuit Court of Appeals conceded that consideration of a motion for rehearing, which was timely when made, extended the time to appeal from the original judgment of sentence.

With respect to the third ground, petitioners' counsel stated that it was intended to show abuse of discretion which could not be ruled upon until the record was made and shown to the Court.

After oral argument, the Court granted the motion without any opinion and with the endorsement of the single word "granted" on the motion papers. The presiding judge stated that since there was a plea of guilty, the appeal could relate only to the sentence over which the Court had no jurisdiction and granted the motion to dismiss.

Petitioners' point is that on that record alone it was improper to dismiss the appeal.

The Notice of Appeal and Assignment of Errors, though filed in the District Court, were not before the Circuit Court of Appeals, and that Court declined the offer of counsel to file a memorandum setting forth the grounds of the appeal, etc.

The Question Raised.

The question raised is whether or not the petitioners have been denied due process and their statutory rights by the summary disposition of this appeal, and by the summary disposition of the matter in the District Court.

Jurisdiction Of The Supreme Court Of The United States In This Proceeding.

This is a criminal case finally adjudicated in the Circuit Court of Appeals of the United States for the Second Circuit, and jurisdiction of the Supreme Court of the United States to issue a Writ of Certiorari to that Court is invoked under Section 240 of the Judicial Code, Title 28, United States Code Annotated, Section 347.

Reasons Relied On For Allowance Of Writ.

The appeal in the Circuit Court of Appeals was timely because it was within five days after the entry of the order and final disposition on the petition for rehearing or reconsideration, which itself was timely (*Wayne Gas Co.* v. *Owens-Illinois Co.*, 300 U. S. 131, 135-138).

The fact that the petitioners pleaded guilty does not bar an appeal. The plea of guilty merely makes a trial unnecessary and leaves the petitioners in the same position to appeal on all other grounds as if there had been a trial and conviction.

The petitioners had a right to show abuse of discretion and unless and until the record is made and submitted to the Circuit Court of Appeals, no ruling could be made. Counsel should not be required by the Court to state in substance the nature of the appeal and have such oral statement take the place of a complete record.

Petitioners are aware that the judge has discretion in fixing a fine and that there is no appeal from a fine on the ground that it is excessive and that is not the nature of this appeal. The petitioners have the right to the free, unbiased judgment of the District Court and particularly have the right to the free judgment of the District Court exercised without bias which might be created by any false

statements on the part of the Assistant District Attorney. If the Assistant District Attorney had stated that the petitioners were third or fourth offenders such statement would no doubt prejudice the Court and the petitioners would have a right to deny such issue and have a fair trial.

The petitioners pleaded guilty upon the representation of the Assistant District Attorney that the information as filed covered only misdemeanors, and that no substantial punishment would be requested because these defendants were not the principal defendants which the government sought to prosecute.

The District Attorney requested a fine of One Thousand ($1,000) Dollars but the Court fined the defendants "jointly and severally" Five Hundred ($500) Dollars.

Thereafter, the Assistant District Attorney stated to the Court that the defendants had made an illegal profit of Sixty-six Hundred ($6600) Dollars, that the defendants' counsel had so agreed (which is denied), and that the individual defendant was the ringleader for a gang of conspirators guilty of a criminal conspiracy, and requested a further fine of Sixty-six Hundred ($6600) Dollars "jointly and severally" making a total fine of Seventy-one Hundred ($7100) Dollars. The defendants sought reconsideration on the ground that they denied any such profit or any agreement as to such profit, or any conspiracy, and asked for an opportunity to offer testimony to disprove such prejudicial statements.

The memorandum denying the petition for rehearing stated:

> "Motion denied. The questions now raised were all considered at the trial of sentence.
>
> Alfred C. Coxe."

There was no trial of sentence. After fixing a fine of Five Hundred ($500) Dollars, the District Court Judge then said in substance:

"Now we come to the profits."

When the petitioner denied any profit, the District Court Judge said:

"You mean you blew it."

and added in substance:

"I'll fine you in addition $6600 jointly and severally to cover the profit."

Upon request of the Assistant District Attorney, the fine was broken down to $5,000 and $1,600 on separate counts because by law a fine is limited to $5,000 for any one offense. The statements made by the Assistant District Attorney were false and are known by him to be false. That they were prejudicial is shown by the fact that the Court specifically relied on them in fixing the additional fine.

When all facts are brought out, it is doubtful if these petitioners were even technically guilty of a violation of the law and they would not have pleaded guilty but for the representations of the Assistant District Attorney. They pleaded guilty only on the representations of mild treatment, it appearing that that would be less expensive than a defense and the lengthy accounting involved.

Having been induced to plead guilty by the false representations of the Assistant District Attorney, as to the position they intended to take, the petitioners seek the right to appeal on all grounds available as set forth in the Notice of Appeal and Assignment of Errors printed in the appendix hereto.

The petitioners' position is that they had a right to deny and have a trial with respect to every statement made by the Assistant District Attorney to the Court which was not a part of the information to which the petitioners pleaded guilty; which was made to the Court to influence its judgment; and which was made with the intention that it be relied upon by the Court.

CONCLUSION.

For the foregoing reasons, the petitioners pray that this petition for a Writ of Certiorari be granted, and since there was no record in the Circuit Court of Appeals other than the Notice of Motion and statement of the Clerk, copies of which are printed herein, that, upon the granting of the Writ, this Court, without further hearing, set aside the summary dismissal of the appeal in the Circuit Court of Appeals, with leave to the petitioners to file the record in that Court, and have their appeal heard in that Court in accordance with law.

LEIF B. NORSTRAND,
NORSTRAND CORPORATION,
By RING & MURRAY,
Attorneys for Petitioners.

New York City,
August 31, 1943.

APPENDIX.

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

C113-250.

UNITED STATES OF AMERICA

vs.

THE NORSTRAND CORPORATION and LEIF NORSTRAND.

NOTICE OF APPEAL

Appellants:

The Norstrand Corporation c/o Ring and Murray Room 2166 630 Fifth Avenue New York, N. Y.

Leif Norstrand 10 Kempster Road Scarsdale New York.

Appellants' Attorneys:

RING and MURRAY Room 2166 630 Fifth Avenue New York, N. Y.

Offense:

Violation of rules, regulations, orders and price schedules promulgated under Public Law 421 77th Congress known as the "Emergency Price Control Act of 1942" in that the defendants were charged with buying and selling waste paper at over the ceiling

prices and failing to keep accurate records thereof. The proceeding was brought on by an information filed on or about November 24th, 1942 (15 counts).

Date of Judgment:

December 8, 1942 made final April 19th, 1943 by the denial of a petition for reconsideration.

Brief Description of Judgment or Sentence:

Appellants were sentenced to pay fines jointly and severally in the amounts of $5,000 on the first count, $1,600 on the second count, and $500 on all the other counts, making a total of $7,100.

We, the above-named appellants, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment above mentioned and from the order denying a petition for reconsideration thereof on the grounds set forth below.

THE NORSTRAND CORPORATION
by LEIF NORSTRAND
President

LEIF NORSTRAND

Dated: April 23rd, 1943

Grounds of Appeal:

1. The judgment is null and void for the reason that the offenses claimed are punishable by a fine of $75,000 and fifteen years' imprisonment, and are deemed felonies under Section 541 Title 18 United States Code Annotated and cannot be prosecuted upon information, and the Court acquired no jurisdiction.

2. Prosecution for such infamous crimes can only be on a presentment or indictment of a grand jury and the entry of the judgment of fine herein is on an information without an indictment of a grand jury and is a violation of the appellants' constitutional rights (5th Amendment) which said rights are jurisdictional and cannot be waived.

3. The Trial Court was in error and denied the appellants their constitutional rights in not advising them at or before the plea of guilty or within ten days thereof, during which time the plea could be withdrawn, that this was an infamous crime, and that the appellants had a right to be free from prosecution except on the indictment of a grand jury.

4. The Court erred in denying the appellants substantial and constitutional rights in permitting the District Attorney to make statements and charges and in accepting and relying on statements and charges of crimes outside of the scope of the information in determining or considering the scope of punishment.

5. The Court erred in measuring the punishment in proportion to asserted profits of the appellants without opportunity to be heard on the amount of said profits.

6. Appellants were denied their constitutional rights to due process of law in having asserted profits assessed against them in the form of a fine without opportunity to be heard.

7. The appellants were denied a fair trial or fair treatment in respect to the determination of the fines

imposed against them for all the reasons set forth in the petition for reconsideration heretofore mentioned herein.

8. Section 5 b of the "Emergency Price Control Act of 1942", Title 50, USCA, Section 925 is unconstitutional and void because it provides that criminal proceedings may be commenced by the Attorney General "in his discretion" permitting discrimination among offenders.

RING & MURRAY
CARL E. RING
Attorneys for Appellants

Assignment Of Errors.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES

vs.

LEIF NORSTRAND and THE NORSTRAND CORPORATION.

NOW COME the defendants, by their attorneys, and say that in the proceedings herein and in the orders and judgments entered there are manifest errors, to wit:

Assignment Of Errors.

ASSIGNMENT OF ERROR NO. 1.

The judgment entered herein is null and void for the reason that the offenses complained of are infamous crimes for which the defendants cannot be held to answer unless on a presentment or indictment of a grand jury (5th Amendment, Constitution).

ASSIGNMENT OF ERROR NO. 2.

The judgment entered herein is null and void for the reason that the offenses complained of are felonies under Section 541, Title 18, United States Code Annotated, and cannot be prosecuted upon information.

ASSIGNMENT OF ERROR NO. 3.

The judgment entered herein is null and void for the reason that there was no presentment or indictment of a grand jury and the Court acquired no jurisdiction.

ASSIGNMENT OF ERROR NO. 4.

The Court erred in not advising the defendants at or before the plea of guilty, or within such time as such plea could be withdrawn, that the crimes charged against the defendants could be prosecuted only upon the presentment or indictment of a grand jury.

ASSIGNMENT OF ERROR NO. 5.

The Court erred in permitting the District Attorney to make statements and charges of crimes in excess of those charged in the information herein.

ASSIGNMENT OF ERROR NO. 6.

The Court erred in accepting and relying on statements and charges of crimes outside of the scope of the information filed herein in determining or considering the scope of punishment.

ASSIGNMENT OF ERROR NO. 7.

The Court erred in measuring the punishment directly in proportion to profits of the defendants claimed by the District Attorney and denied by the defendants without opportunity to be heard on the amount of said profits.

ASSIGNMENT OF ERROR NO. 8.

The Court erred in fining the defendants jointly and severally an amount equal to profits which the District Attorney asserted that the defendant corporation had received.

ASSIGNMENT OF ERROR NO. 9.

The Court erred, notwithstanding the plea of guilty, in holding the defendants liable for penalties in view of the defendants' claim of having acted in good faith as provided in Section 925 (d) Title 50, United States Code Annotated.

ASSIGNMENT OF ERROR NO. 10.

The Court erred, notwithstanding the plea of guilty, in refusing to permit the defendants to call witnesses and be heard and show the extent to which they acted in good faith.

ASSIGNMENT OF ERROR NO. 11.

The Court erred in entering any judgment in this proceeding for the reason that Section 925 (b) of Title 50, United States Code Annotated, under which the fines were rendered, is unconstitutional and void as discriminatory for the reason that it permits the Attorney General to prosecute violators of the act, or not, wholly "in his discretion".

ASSIGNMENT OF ERROR NO. 12.

The Court erred in denying to the defendants a fair trial in respect to the determination of the fines imposed against them for all the reasons set forth in the petition for reconsideration herein, which petition was filed March 8, 1943, and denied April 19, 1943.

And by reason of said errors and other manifest errors appearing in the record herein, the defendants pray that the judgment of Seventy-one Hundred ($7100) Dollars fines jointly and severally against the defendants be set aside.

RING and MURRAY,
Attorneys for Defendants.

To:

Hon. MATHIAS F. CORREA,
United States Attorney.

CLERK OF THE UNITED STATES DISTRICT COURT,
Southern District of New York.

Notice Of Motion.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

C 113-250.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THE NORSTRAND CORPORATION and LEIF NORSTRAND,
Defendants-Appellants.

Sirs:

PLEASE TAKE NOTICE that upon the certificate of the Clerk of the United States District Court for the Southern District of New York, dated June 17, 1943, and the affidavit of Gerald V. Clarke, Assistant United States Attorney for the Southern District of New York, verified the 17th day of June, 1943, hereto annexed, and upon all the proceedings heretofore had herein, the undersigned will move this Court at the present term thereof, held in the United States Court House, Borough of Manhattan, City of New York, on the 28th day of June, 1943, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, for an order dismissing the appeal filed herein by the above-named defendants-appellants on April 24, 1943, because in so far as the appeal is taken from

the sentence, more than five days elapsed from the date of sentence to the filing of a notice of appeal, and in any event the sentence was upon a plea of guilty, and in so far as the appeal is from the denial of a motion to reduce the amount of the fine, the determination of the lower Court was within its discretion and is not appealable.

Dated: New York, N. Y., June 17, 1943.

Yours, etc.,

HOWARD F. CORCORAN,
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff-Appellee,
United States Court House,
Foley Square,
Borough of Manhattan,
City of New York.

To:
RING & MURRAY, Esqs.,
Attorneys for Defendants-Appellants,
Room 2166,
630 Fifth Avenue,
New York, N. Y.

Affidavit Of Gerald V. Clarke.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

C 113-250.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THE NORSTRAND CORPORATION and LEIF NORSTRAND,
Defendants-Appellants.

State of New York
County of New York
Southern District of New York
} ss.:

Gerald V. Clarke, being duly sworn, deposes and says that he is an Assistant United States Attorney for the Southern District of New York, and is in charge of the above entitled action.

That on the 4th day of December, 1942, the defendants-appellants, The Norstrand Corporation and Leif Norstrand pleaded guilty to an information charging them with buying and selling waste paper at over-the-ceiling prices and failing to keep accurate records thereof, in violation of Public Law 421, 77th Congress, known as the Emergency Price Control Act of 1942.

Said defendants-appellants were subsequently sentenced before the Honorable Alfred C. Coxe, United States District Judge for the Southern District of New York on December 8, 1942, to fines jointly and severally in the amounts

of $5,000 on the first count, $1,600 on the second count and $500 on all the other counts, making a total of $7,100.

Heretofore, on the 8th day of March, 1943, the defendants-appellants submitted a petition for reconsideration of judgment and a reduction in sentence. An affidavit in opposition to this motion was filed by plaintiff-appellee on April 19, 1943. This petition was denied by Honorable Alfred C. Coxe, United States District Judge on April 19, 1943.

That subsequently, on April 24, 1943, said defendants-appellants filed notice of appeal from the sentence and the denial of their petition for reconsideration of judgment and reduction in sentence and also filed on May 4, 1943 assignment of errors in connection with the notice of appeal.

No previous application for the relief herein asked has heretofore been made.

WHEREFORE, your deponent prays that this Court dismiss the appeal of the defendants-appellants in the above entitled matter taken on April 24, 1943.

(1) In so far as it is an appeal from the sentence imposed December 8, 1942, for the reason that this judgment was final at that time and did not become final as appellant contends some four months later, and more than five days elapsed from December 8 before the appeal was taken, and also for the reason that the appellant pleaded guilty to the information and therefore cannot appeal from the sentence imposed.

(2) In so far as it is an appeal from the denial of the motion for a reduction of sentence, for the reason that the lower Court's determination not to reduce the amount of the fine was a determination of the matter which was

purely discretionary and may not be made the subject of an appeal in the absence of any showing of an abuse of discretion.

GERALD V. CLARKE,
Assistant United States Attorney.

Sworn to before me this
17th day of June, 1943.

LEO COHEN,
Notary Public,
Kings Co. Clk.'s No. 112.
N. Y. Co. Clk.'s No. 234, Bronx Co. Clk.'s No. 23.
Commission expires March 30, 1944.

Clerk's Certificate.

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

THE NORSTRAND CORPORATION and LEIF NORSTRAND,
Defendants-Appellants.

I, George J. H. Follmer, Clerk of the United States District Court for the Southern District of New York, do hereby certify that on December 4, 1942, the above named defendants-appellants pleaded guilty to an informa-

tion charging them with buying and selling waste paper at over-the-ceiling prices and failing to keep accurate records thereof, in violation of Public Law 421, 77th Congress, known as the Emergency Price Control Act of 1942.

That thereafter, on December 8, 1942, the above named defendants-appellants were sentenced by the Honorable Alfred C. Coxe, United States District Judge to pay fines jointly and severally in the amounts of $5,000, on the first count, $1,600 on the second count and $500 on all other counts, making a total of $7,100.

That on March 8, 1943, the above named defendants-appellants submitted a petition for reconsideration of a judgment and reduction in sentence. An affidavit in opposition to this motion was filed by the plaintiff-appellee on April 19, 1943. This petition was denied by the Honorable Alfred C. Coxe, United States District Judge on April 19, 1943.

That subsequently, on April 24, 1943, the defendants-appellants filed a notice of appeal from the sentence imposed on December 8, 1942, and from the denial of the petition for reconsideration of judgment and reduction of sentence; and on May 4, 1943 defendants-appellants filed an assignment of errors in connection with their notice of appeal.

Dated: June 17, 1943.

GEORGE J. H. FOLLMER,
Clerk,
United States District Court,
Southern District of New York.

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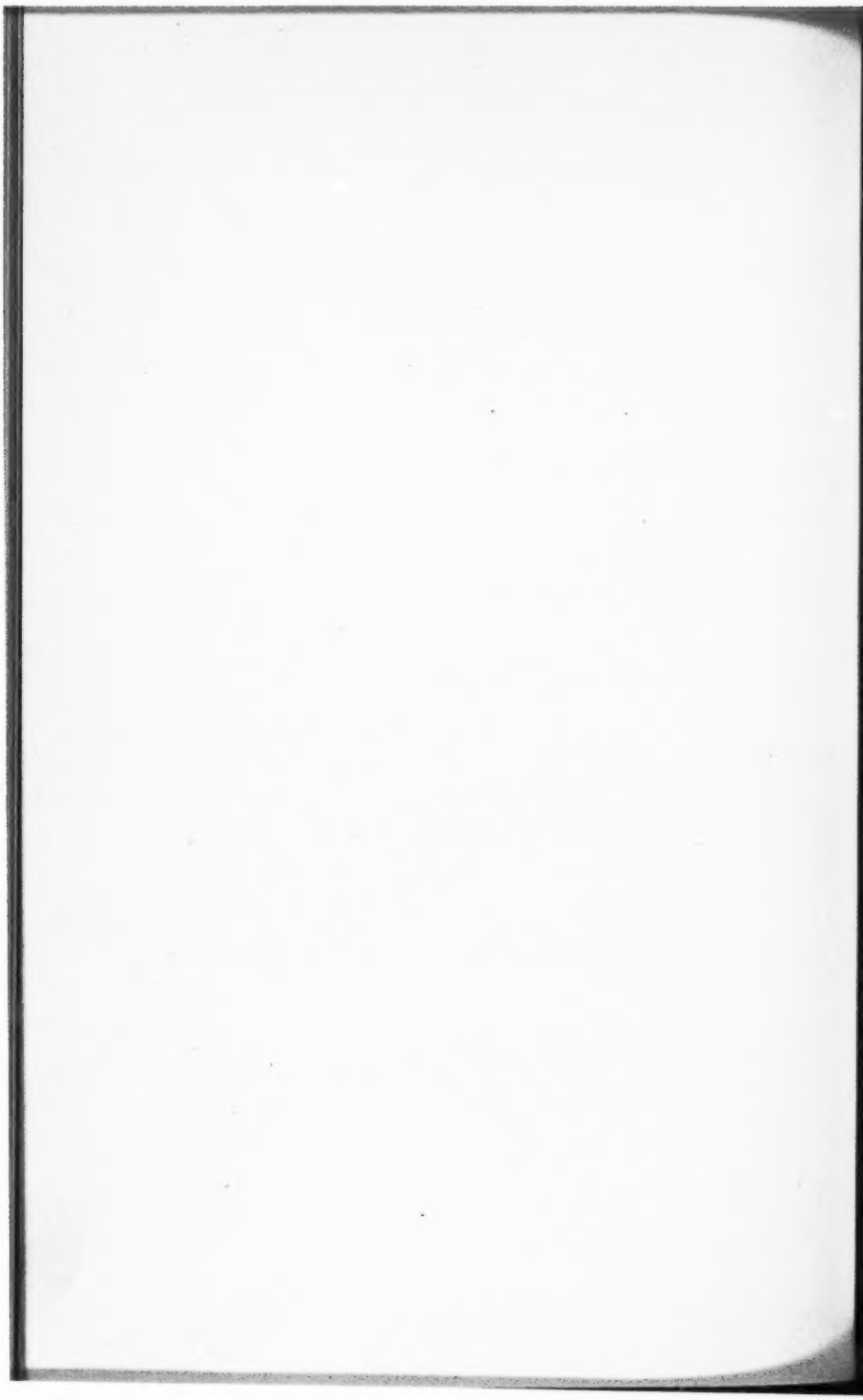
CITATIONS



In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 321

THE NORSTRAND CORPORATION AND LEIF NORSTRAND, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

No opinion was rendered by the circuit court of appeals (Pet. 3).

JURISDICTION

The judgment of the circuit court of appeals was entered August 4, 1943 (Pet. 1), and the petition for a writ of certiorari was filed September 4, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether the trial court's order denying a motion for reconsideration and reduction of sentence is appealable.

STATEMENT

On December 4, 1942, petitioners pleaded guilty in the United States District Court for the Southern District of New York to violation of Section 4 (a) of the Emergency Price Control Act of 1942 (c. 26, 56 Stat. 23, 50 U. S. C. App. Supp. II, sec. 904 (a)) in the buying and selling of waste paper at prices above ceiling, and the failing to keep accurate records thereof (Pet. 1, Pet. App. 8–9). On December 8, 1942, they were sentenced to pay fines totaling $7,100 (Pet. 1–2), and on March 8, 1943, they filed a petition for "reconsideration or rehearing" of the judgment of sentence (Pet. 2), described by the clerk of the court as "a petition for reconsideration of a judgment and reduction in sentence" (Pet. App. 20), which was denied on April 19, 1943 (Pet. 2). On April 24, 1943, petitioners filed a notice of appeal from the sentence imposed on December 8, 1942, and from the denial of the petition for "reconsideration of the judgment" or reduction of sentence (Pet. 2). On July 19, 1943, the circuit court of appeals, without opinion, granted the Government's motion to dismiss the appeal (Pet. 2–3).

ARGUMENT

Although petitioners undertook to appeal from the judgment of conviction entered more than four months previous to their notice of appeal, they concede that they seek review only of the order denying their motion to reduce the sentence, it being petitioners' contention that they have "a right to show" that the trial court was guilty of an "abuse of discretion" in denying the motion (Pet. 4). Pretermitting the possible untimeliness of petitioners' appeal (see *Burr* v. *United States,* 86 F. (2d) 502, 503 (C. C. A. 7)), it is settled that an order denying a motion for reconsideration of judgment of a sentence which is within the limits allowed by statute is not appealable. *Bensen* v. *United States,* 93 F. (2d) 749, 751 (C. C. A. 9); *Beckett* v. *United States,* 84 F. (2d) 731, 732–733 (C. C. A. 6); *Kachnic* v. *United States,* 53 F. (2d) 312, 315 (C. C. A. 9); *Feinberg* v. *United States,* 2 F. (2d) 955, 958 (C. C. A. 8), and cases cited; *Bailey* v. *United States,* 284 Fed. 126, 127 (C. C. A. 7); see *Wayne Gas Co.* v. *Owens Co.,* 300 U. S. 131, 137; *Conboy* v. *First National Bank of Jersey City,* 203 U. S. 141, 145; *San Pedro Co.* v. *United States,* 146 U. S. 120, 137; cf. *Smith* v. *United States,* 52 F. (2d) 848 (C. C. A. 7), and cases cited.[1] "If there is one rule in

[1] Petitioners do not assert that the judgment as it appears on the face of the record is wholly or partially void and as such requires correction. See *Holiday* v. *Johnston,* 313 U. S. 342, 349; *Miller* v. *Aderhold,* 288 U. S. 206, 210, 211.

the federal criminal practice which is firmly established, it is that the appellate court has no control over a sentence which is within the limits allowed by a statute." *Gurera* v. *United States,* 40 F. (2d) 338, 340–341 (C. C. A. 8).

Furthermore, it is apparent from the petition that the denial of the motion to reduce the sentence was a proper exercise of the court's discretion. It is asserted that the sentence is the result of false representations made by the Assistant United States Attorney (Pet. 6), but the truth or falsity of such representations was at issue at the time of sentence, for the trial court stated in denying the petition "the questions now raised were all considered at the trial of sentence" (Pet. 5).[2] It is not asserted that petitioners sought to withdraw their plea of guilty or moved for a new trial on the basis of newly discovered evidence. The relief sought was therefore confined to modification of a judgment of sentence which fell within the authorized penalties of the statute. Such modification "was entirely within the discretion of the trial court." *Kachnic* v. *United States,* 53 F. (2d) 312, 315 (C. C. A. 9); cf. *Stephan* v. *United States,* 133 F. (2d) 87, 100 (C. C. A. 6), certiorari denied, 318 U. S. 781.

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[2] Petitioners state that "there was no trial of sentence" (Pet. 6), but the petitioners inconsistently recite that when the court came to appraise "the profits," petitioners denied any profit (*id.*).

CONCLUSION

The case was correctly decided below. There is no conflict of decisions, and no important question of law is presented. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

CHARLES FAHY,
Solicitor General.
TOM C. CLARK,
Assistant Attorney General.
OSCAR A. PROVOST,
Special Assistant to the Attorney General.
MALCOLM A. HOFFMANN,
Attorney.

SEPTEMBER 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943